

July 7. 1768.

A N S W E R S

F O R



JOHN BATTEN Merchant in London, and his
Factor;

T O T H E

PETITION of William Cheap Merchant in Edinburgh.

IN the month of October 1765, Andrew Farquhar, merchant in Edinburgh, proposed to purchase, from the said John Batten, a quantity of goods to the value of L. 332 : 5 : 5. But, as he could not pay the price in ready money, and was at that time owing a considerable sum for goods formerly purchased by him, Mr Batten was unwilling to trust him to so great an extent. He, however, agreed to consign the goods in the hands of Mr Ebenezer M'Culloch merchant in Edinburgh, to be delivered to Mr Farquhar, upon his making payment to Mr M'Culloch of the sum of L. 200 Sterling, as the value of the former parcel of goods (the price whereof seems not to have been then precisely ascertained) for which Mr Farquhar granted a bill upon the 29th of October 1765, payable one month after date.

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Of the same date with this bill, Mr. Batten wrote to Mr M'Culloch in the following terms: ' Mr. Andrew Farquhar, whom you was so obliging to recommend to my late partner Mr Gibson and myself, is now in town, and has bought of me goods to the amount of L. 300 Sterling and upwards, and not discharging the accompt in my books as I expected, has desired the goods, now purchased, may be consigned to you, until he has paid into your hands the sum of L. 200, which I have this day drawn on him for, inclosed to you at one month, which, when paid, pray deliver to him the case directed to you for him.' And to this letter is added the following postscript: ' Shipped on board the Mary and Janet, James Gibson master, for Leith, one case, No 1. marked E. M.'

This box of goods, upon coming to hand, was deposited by Mr M'Culloch in the warehouses in the Earl of Moray's lodging, which he then had in tack from the British Linen Company, and have since been converted into a Linen-hall: And, altho' he tried every method to get Farquhar to retire the bill, he was obliged to protest it, and do diligence, before he could even recover a partial payment. But Mr Farquhar being desirous to get hold of the goods, made certain proposals on that head, of which Mr M'Culloch informed Mr Batten, who returned him an answer upon the 13th of July 1766, in the following words: ' I think myself greatly obliged by the trouble you have had in the affair of Farquhar; I think he is not intitled to expect any favour from me, as he has been so very neglectful in his engagements with respect to the payments. The goods consigned to you have been from me ten months, and ought to be paid for in two more by his own agreement; and he has the modesty to ask eight months longer, and on the risque of L. 150 his own security. If Mr Farquhar can find unexceptionable security for the whole to your satisfaction, he may have the goods, otherwise he shall have nothing to do with them; and then

'I give up the article of the eight months he has no right to:
 'But, to prevent further trouble, as the goods are there, I
 'would consent; if he makes any objection, he shall not have
 'them at all, as he has bought them so well, that I am in
 'no fear of being a loser by the return, many of the articles
 'being considerably advanced since, and still likely to be dear-
 'er. If, on the receipt of your answer, I should find he is
 'not to have them, I will immediately order them back; re-
 'lative to the bill accepted by him, value L. 200, the balance
 'due to me is only L. 175: 18: 0, exclusive of the goods in
 'your custody; but, by his own offer, he was to make up
 'the sum of L. 200 Sterling, and pay half the remainder in
 'six months after; instead of which, he has not yet dischar-
 'ged the first parcel, which he ought to have done before
 'he left London. I am now a considerable loser by the sale
 'of these goods, and do expect he pays me interest from the
 'time of his acceptance being due, as our profits are too tri-
 'fling to admit of such delays.'

Mr M'Culloch having removed at Whitsunday 1766 from
 the warehouses he possessed under the British Linen Company,
 the before mentioned box of goods was, by mistake, left be-
 hind. It was, however, soon thereafter sent for; but Mr George
 Goldie the manager for the Company thought proper to de-
 tain it until Mr Farquhar's bankruptcy, which happened in
 February 1767, under the pretence of arrestments being used
 in the hands of the Company and the keepers of the Linen-
 hall.

This obliged Mr M'Culloch to bring an action before the
 magistrates of the Canongate against Mr Goldie and the
 keepers of the Linen-hall, concluding against them for deli-
 very of the box of goods, or for payment of the value there-
 of.

To this process Mr Goldie gave in defences, by which it
 was kept in dependence till the 12th of May 1767, when Wil-
 liam Cheap merchant in Edinburgh thought proper to bring
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Francis Fraser a sheriff-officer, together with a notary and two appraisers, to the said Linen-hall, where they broke open the box, in order to point the goods therein contained as belonging to Andrew Farquhar, to whom Mr Cheap was creditor.

Upon this occasion, George Farquhar writer in Edinburgh appeared as procurator for Mr M'Culloch, and, in presence of a notary and witnesses, read over the before mentioned letters; and another letter from Mr Batten of the 23d of April 1767, in which he wrote to Mr M'Culloch as follows: 'As I find Mr Farquhar is not likely to redeem the box of goods consigned to your safe keeping, until he should have discharged a former account due me, and given you sufficient security for the value of that box of which you have an invoice, I desire you will immediately ship them for London, consigned back again to me, as they are my property.' The said George Farquhar likewise at this time exhibited the L. 200 bill still unredeemed; and insisted, that as the goods had never been delivered to Andrew Farquhar, or to any person for his behoof; they therefore could not be attached as his property by any of his creditors.

George Young merchant in Edinburgh, and partner in trade with Mr M'Culloch, likewise appeared upon this occasion, and set forth, 'That Mr M'Culloch himself being at present in the country, he the said George Young was willing to make oath to the truth of what the said George Farquhar had set forth; and that the said parcel of goods were never delivered by Mr M'Culloch to the said Andrew Farquhar since the consignment thereof in his hands by the said John Batten, or to any other person for his behoof; but had been retained by Mr M'Culloch as the property of the said John Batten, and was to have been returned to London by the first opportunity, in terms of John Batten's letters before recited.'

This oath the sheriff-officer refused to administer, in respect that Mr Young was not the party claiming the property of the

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the goods: Upon which the said George Farquhar desired and required the said William Cheap, and the said Francis Frazer, James Burges's notary-public, the said Archibald Bowie, and William M'Beath appraisers, and every other person then present, who should be concerned, or concur in the poinding foresaid, to desist and leave off from poinding the foresaid box or package of goods, the same not being the property of Andrew Farquhar, but of the said John Batten; and in case they, or any of them, proceeded further therein, he the said George Farquhar, as procurator foresaid, protested, that the said William Cheap, at whose instance the poinding was carrying on, and the said Francis Frazer officer, and the haill other persons foresaid, concerned or assisting in the execution of the said poinding, should be liable to the said John Batten in the pains and penalties of a wilful spuilzie, and for the price of the said box of goods, according as the same should be ascertained by the said John Batten; and for all damages and expences that might be sustained or incurred by the said John Batten, through the said poinding being further carried into execution.

Notwithstanding this protest, and the evident proof that the goods were not the property of Andrew Farquhar, but of Mr Batten, Mr Cheap and his associates thought proper to proceed in their poinding, and carried off the whole.

This obliged Mr Batten to bring an action against them before this court, in which he concluded for restitution of his goods, and for L. 100 in name of damages; or else, that the defenders should make payment to him of L. 332 : 5 : 5, as the price of those goods, with interest from the 29th of October 1765, and the like sum of L. 100 in name of damages and expences.

This action having come in course before the Lord Hailes Ordinary, the defenders insisted, *imo*, That as the sale of the goods to Farquhar was acknowledged, the property thereof was effectually transferred to him upon their being transmitted

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to.

to Mr M'Culloch: And, 2^{do}, That although Mr Batten had stipulated that the goods should not be delivered by Mr M'Culloch until payment was made, or security given for the price of the former parcel, the *jus hypothecæ*, or right of retention thereby established, could be extended no farther than to secure the balance remaining due of that former debt, and that *de facto* it was totally extinguished prior to the poinding, partly by voluntary payments made by Farquhar, and partly by bills which he had assigned or indorsed to Mr Batten in security and payment.

The pursuer, Mr Batten, on the other hand, contended, That the sale never had been compleated, by reason of Mr Farquhar's failing to implement the conditions imposed upon him; and that, even at the date of the poinding, he had not recovered full payment of the old debt.

The Lord Ordinary, upon advising this debate, pronounced an interlocutor on the 6th of August last, in the following terms: 'Ordains the defender to produce the warrants of the poinding; and grant warrants for letters of incident diligence at his instance, to the 12th of November next, for recovering vouchers of payment or extinction of the draughts by Farquhar to the pursuer.'

In obedience to this appointment, the defender produced the warrants of his poinding; and the pursuer gave in an exact state or condescendence of the different payments which Mr M'Culloch had received towards extinction of the former debt due by Andrew Farquhar, which debt, at the 29th of October 1765, when he granted his bill to the pursuer for L. 200, turned out to amount only to L. 175 : 18 : 0.

From this state it appeared, that Andrew Farquhar had indorsed to Mr M'Culloch, for behoof of the pursuer, four bills accepted by one John Johnston, a kind of merchant in this city, who became bankrupt at the same time with Farquhar himself; and another acceptance by Kennedy and Meikison, for L. 37 : 19 : 11, and that Mr M'Culloch had only been able to

to recover by the 23d of March 1767, L. 131 : 11 : 0, which, after much labour and expence, he got, partly from Farquhar, and partly from Johnston, and Kennedy and Meikison.

Mr M'Culloch had no opportunity of poinding Farquhar's effects along with his other creditors: But Johnston having been conjoined in the poinding of these effects as creditor to Farquhar, Mr M'Culloch attached his interest in them by a new poinding, in consequence of hornings raised upon his four acceptances already mentioned. This, however, he found a very expensive operation, being obliged to poind the whole of Farquhar's shop-goods, as Mr Johnston's interest in them could not be settled till they were brought to a sale, and was not fixed till the 30th of May 1767, when, upon a division of the price, it was ascertained to be L. 73 : 8 : 5.

This sum was uplifted by Mr Alexander Gray writer to the signet, as doer for Mr M'Culloch, with the consent of Johnston's other creditors, who used arrestments in his hands, in order to secure the remainder, if any should be, after paying the debt due to the pursuer Mr Batten. But when, from the sum so recovered, the expence of doing diligence upon Johnston's four bills, and the expence of the poinding itself, are deducted, it will appear, that the remainder was not even sufficient to extinguish the debt of L. 175 : 18 : 0 due to the pursuer, and the interest thereon from the 29th of November 1765, when Farquhar's bill became payable.

The above facts being set forth in the state exhibited by the pursuer, Mr Cheap gave in observations upon it; to which the pursuer was allowed to make answers; and, upon the 1st of March last, the Lord Ordinary pronounced an interlocutor in the following terms: 'The Lord Ordinary having considered the libel, writs produced, state of accompts, objections and answers, finds, That at the date of the poinding, 12th May 1767, the goods libelled were the property of John Batten pursuer; and therefore that they were wrongfully poinded as the property of Andrew Farquhar. Finds William Cheap defender liable to the pursuer, in the sum of three hundred and thirty-two pounds

' pounds five shillings and five pence Sterling, as the price of
 ' the said goods, with the legal interest of the said sum from
 ' the said 12th of May 1767, being the date of the poinding,
 ' and until payment; and also in the expence of procefs, and
 ' ordains an account thereof to be given in: But, in respect of
 ' the circumstances of the case, assoilzies the said William
 ' Cheap from the other conclusions of the libel. And in
 ' regard it appears, that the said John Batten did, by his
 ' trustee Ebenezer M'Culloch, recover a certain sum, not yet
 ' liquidated, out of the effects of Andrew Farquhar, or of
 ' John Johnston merchant in Edinburgh, and that over and
 ' above the sum of one hundred and seventy-five pounds eighteen
 ' shillings Sterling due to him by the said Andrew Farquhar, finds,
 ' That William Cheap defender must retain out of the sums
 ' decerned for a sum equivalent to the said over-payment
 ' for his own behoof as a creditor of Andrew Farquhar,
 ' or of John Johnston, or for the behoof of the other credi-
 ' tors of Andrew Farquhar or of John Johnston, who may
 ' hereafter, in course of law, be found intitled to all, or any
 ' part of the sum so retained. And, in order that the said
 ' over-payment may be liquidated, remits to Ludovick Grant
 ' accomptant to make out a state thereof at the sight of
 ' parties and to report: Assolizies the hail other defenders,
 ' in respect that they acted under the authority of a lawful
 ' warrant; and decerns.' And, to this interlocutor, his Lord-
 ' ship adhered upon the 11th of the same month.

Against these interlocutors, Mr Cheap has been pleased to
 prefer a petition; and your Lordships having appointed it to
 be answered, the following observations are humbly offered
 upon the part of the respondent.

The petitioner's argument amounts in substance to this:
 That from the respondent's letter to Mr M'Culloch, of the
 29th October 1765, the following particulars are proved:
1mo, That the goods in question were sold by the respondent,
 and purchased by Farquhar. *2dly*, That they were sent
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down to Scotland by sea, consigned to Mr M'Culloch, for Farquhar's behoof. 3dly, That Mr M'Culloch, the consignee, was of Mr Farquhar's nomination and appointment. And, 4thly, That the sole end and purpose of the consignment was, that the goods should remain with Mr M'Culloch till such time as Farquhar should make payment of the sum of L. 200, being L. 24:2 more than the balance of their former dealings; but that no such hypothecation was stipulated for the remainder of the price of the parcel last purchased, the respondent having agreed so far to rely upon Farquhar's personal security. And, from these particulars, the petitioner draws this conclusion: That the respondent's claim can extend no further than to secure him in a preference to the extent of L. 200 over the other creditors of Farquhar attaching these goods by legal poindings.

But, in answer to this, it is, in the pursuers humble apprehension, perfectly clear from the letters in process, that there was no absolute sale in this case. Mr Farquhar's credit and character were equally unknown to the respondent. One parcel of goods had indeed been sold to him upon credit, on the recommendation of Mr M'Culloch, from the necessity which every merchant is under to run risques in order to establish an extensive trade; but it is not to be supposed, that after Mr Farquhar had failed to discharge the price of this first parcel, the respondent would be very ready to renew or rather to double his credit, without some security for payment of what was already due to him; on the contrary, it appears that he would by no means agree to do so; upon which Mr Farquhar was obliged to propose to grant his bill for L. 200 Sterling, as the price of the first purchase, (which was not then precisely ascertained), and that Mr Batten should consign the goods to some person in Edinburgh, in whom he had confidence, to be delivered up only in case of his making punctual payment of the L. 200 bill. Mr M'Culloch, who was the respondent's friend and correspondent, was the man pitched upon to deal with Farquhar; to him therefore the respondent

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consigned

consigned the goods, and to him also he indorsed Farquhar's L. 200 bill; which last circumstance is of itself sufficient to show, that he was no consignee or trustee for Farquhar; as on that supposition it would have been highly absurd to have indorsed the bill to Mr M'Culloch, and to have given him so ample and unlimited a trust without some acknowledgement of the obligation.

Your Lordships will also observe, that the respondent, upon being informed by Mr M'Culloch of the unsuccessful endeavours he had used to obtain payment of the L. 200 bill, did, with great propriety, consider every thing to be at an end betwixt him and Mr Farquhar as to former terms; and therefore, by his letter of the 31st July 1766, he discharged Mr M'Culloch, as his trustee and factor, to give the goods to Farquhar, unless he should find security to his Mr M'Culloch's satisfaction for the price, payable in eight months; and, in the event of Farquhar's not doing so, he ordered Mr M'Culloch to return them back to London. This surely was not the language of a person to his debtor's trustee, but the language of one who is giving explicate commands to his own agent; and accordingly Mr M'Culloch retained the goods in his custody in terms of these instructions, for behoof of the respondent, till Mr Cheap thought proper to point them. It is true, indeed, that by the oversight of his warehouse-keeper, the goods were neglected to be removed from Mr M'Culloch's old to his new warehouse; but that can make no earthly difference, as it cannot be pretended that Farquhar, or any person for his behoof, ever obtained possession of them. Indeed the bargain was totally at an end by Farquhar's failing to fulfil his part: And that being the case, it is absurd to pretend that he could have any sort of interest or property in them; more especially after his bankruptcy, when the price of them could never be paid. The petitioner may as well maintain, that had Farquhar looked at a parcel of the respondent's goods in his own shop, or in the warehouse of his factor, and said, that he would

would pay him a former debt in a month, provided he would then sell him these goods upon credit, but had neither paid his debt nor got the goods delivered; yet still the property of them would have been vested in him. The supposition is exactly similar to the present case; and it is too absurd and ridiculous to be seriously maintained by a man so well acquainted with mercantile affairs as the petitioner.

In short, the petitioner's whole argument proceeds upon the erroneous supposition, that the goods had been deposited in Mr M'Culloch's hands as a pledge or security for payment of the L. 200 bill; but it is altogether an absurd idea, to suppose that a man should deposit his own goods in his own hands, or, which is the same thing, in the hands of his factor or agent, for security of a debt due by another person to himself; nor is there any thing in the observation made by Mr Cheap, that the goods were upon Farquhar's risk when shipped. The respondent believes that Mr Farquhar would not have agreed to this doctrine if they had perished at sea: But, even supposing that an action of damages might have been competent against him, in consequence of their being shipped for this country at his desire, though not directly remitted to himself, it could not affect the present question; for, even although there had been an actual sale, and the goods had been shipped in order to be delivered to Mr Farquhar himself; yet if Farquhar had become bankrupt before receiving them from the shipmaster, the respondent would have been entitled to retain them in preference to any of Farquhar's creditors; tho' no doubt in the case here supposed the sea-risk would have lain upon Farquhar himself.

The respondent further apprehends, that even although the price of the goods had been actually paid by Farquhar, his creditors could not have attached them by poinding before delivery; however they might have been entitled to force delivery or repetition of the price by a proper action against the respondent. It will not therefore avail the petition

tioner to consider the L. 24:2:0 included in the L. 200 bill, over and above the prior debt due by Farquhar to the pursuer, as a part of the price of the second purchase, and to maintain that Mr M'Culloch's intromitting with that sum must have transferred the property of the whole to Farquhar. In so far indeed as Mr M'Culloch may have received more than the price of the former purchase, and the interest due thereon, he may be obliged to repeat to Farquhar's creditors; but as the pursuer cannot now recover payment of the second parcel, and as this second parcel never was delivered to Farquhar, it is impossible that his creditors can pretend to attach it.

At the same time, it is believed, that it will in the end turn out, that Mr M'Culloch has not got payment of more than was due to the respondent upon the former debt, if he has got so much, even including the money in Mr Gray's hands. He never intended by his diligence to secure more; but as Johnston's interest in Farquhar's shop-goods was not fixed, it was necessary to poind the whole. But even supposing that Johnston's dividend secured by Mr M'Culloch's poinding, shall be found to do more than satisfy the debt due to the respondent, it can make no variation in the present question; because it is an acknowledged fact, that no part thereof was received by Mr Gray till after the petitioner's poinding; and as it was altogether uncertain, at the time of Mr M'Culloch's using diligence, what the amount of Johnston's interest in Farquhar's shop-goods would be, it is impossible to say that the pursuer's debt was then paid.

With regard to the expence of process, the respondent will trouble your Lordships with few words. Had Mr Cheap acted *bona fide* in this matter, without having reason to know how matters stood betwixt the respondent and Farquhar, he might have had some apology to plead for his proceeding in the poinding. But as the whole of the correspondence was laid before

before him, and as it from thence appeared, that the goods had never been delivered to Farquhar, or the property transferred to him, he acted *mala fide* in endeavouring to carry them off. And as his doing so put the respondent under the necessity of bringing the present action for recovery of his property, it is but just and reasonable that he should be indemnified of the expences he has thereby incurred. It is therefore hoped, that your Lordships will have no difficulty of adhering to the Lord Ordinary's interlocutor in every point.

In respect whereof, &c.

ALEX. WIGHT.

July 7. 1768.

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In the Court of the Admiralty
Sheweth that the said
John B. & Co. have petitioned
for the recovery of the
sum of £1000.00
being the value of the
goods and chattels
lost by the said
John B. & Co. in the
ship called the
"The Phoenix" which
was wrecked on the
coast of the island of
St. Vincent on the
24th day of March
last.

ALEX. WRIGHT.
T. O. H. F.
In witness whereof, Sec.

PETITION of William B. & Co. Merchants in London.

I, the undersigned, Clerk of the Court, do hereby certify that the within petition was presented to the Court on the 24th day of March last, and that the Court has ordered that the same should be read at the next sitting of the Court, to be held on the 28th day of March next, at which time the petitioners are to appear and shew cause why the same should be granted.

